

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHANNA M. IMMELT,

Plaintiff,

v.

DEE SHARP and TAMBRA  
MCCOWAN,

Defendants.

CASE NO. C20-5617 BHS

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT

THIS MATTER is before the Court on pro se Plaintiff Johanna Immelt's Motion for Summary Judgment,<sup>1</sup> Dkt. 18, and Immelt's Motion to Seal, Dkt. 20. Immelt is a Washington State registered "trainee" real estate appraiser, seeking to become fully licensed. Defendants Dee Sharp (Program Director) and Tandra McCowan (Professional Licensing Manager) are employed by the Washington State Department of Licensing's ("DOL") Real Estate Appraiser Program, charged with overseeing appraiser licensing. In

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<sup>1</sup> Defendants' Response to the Motion, Dkt. 23, argues that Immelt's claims are fatally flawed but does not affirmatively seek Summary Judgment. Defendants' recent Motion for Summary Judgment, Dkt. 32, is based largely on these same arguments. It will be addressed in a separate Order.

1 March 2020, the DOL rejected Immelt's application to sit for the Appraiser Examination,  
2 determining that she had not logged the State-mandated 2000 hours of appraisal  
3 experience in the prior seven years.

4 Immelt sued the DOL Appraiser Program<sup>2</sup> and the individual employees, alleging  
5 that Washington's regulatory scheme regarding such licensing is unconstitutionally vague  
6 on its face, and as applied to her. She asserts claims under 42 U.S.C. § 1983, seeking a  
7 judgment requiring defendants to permit her to sit for the examination and \$300,000 in  
8 lost income damages. Dkt. 6 at 9.

9 Immelt seeks judgment as a matter of law that Washington's appraiser  
10 examination regulatory scheme is unconstitutional. Dkt. 18. Sharp and McCowan argue  
11 that the regulation is constitutional on its face and as applied to Immelt. Dkt. 24. They  
12 argue that to the extent Immelt sues them in their official capacities, they are entitled to  
13 Eleventh Amendment immunity, and that any claims for damages against them  
14 personally are barred by qualified immunity.

## 15 I. BACKGROUND

16 Washington State real estate appraiser licensing is regulated under Washington  
17 Administrative Code ("WAC") Chapter 308-125. Among other requirements, a trainee  
18 appraiser seeking to sit for the licensing examination must document 2000 hours of prior  
19 appraisal experience in a "log," accumulated within seven years of the application. WAC  
20 308-125-070(1). The regulations restrict the maximum hourly credit for a list of various

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22 <sup>2</sup> Immelt's claims against the Appraisal Program itself have been dismissed with  
prejudice. Dkt. 5.

1 kinds of appraisals, including a maximum of twelve hours for a “form report” single  
2 family residential appraisal. WAC 308-125-075(1)(b). A sort of “catch-all” provision  
3 provides that DOL will evaluate on a case-by-case basis experience not specifically listed  
4 in the regulation: “Experience credits for appraisal experience not listed in subsections  
5 (1), (2), or (3) shall be determined by the department on a case-by-case basis.” WAC  
6 308-125-075(4).

7       The material facts are not disputed. Immelt asserts that she got her Trainee License  
8 in 2006 and that she has been appraising for more than 20 years. She claims to have more  
9 than 4000 hours of applicable experience over time. Immelt alleges that DOL accepted  
10 her hours and her application when she first applied to take the appraiser exam in April  
11 2008, and again when she applied in October 2014. Dkt. 18 at 3. Immelt apparently did  
12 not take the examination on the prior occasions.

13       In June 2019, Immelt applied again to take the Real Estate Appraiser’s  
14 Examination. She submitted her experience log with her application and supplemented  
15 her log on December 31, 2019. On January 22, 2020, Defendant McCowan wrote to  
16 Immelt explaining the deficiencies in her log (she was 66 hours short of 2000) and  
17 extended the time for filing a complete log to February 14, 2020. Dkt. 18-3 at 12, Ex. D.  
18 Immelt testifies that she spoke to McCowan on the phone, and McCowan told her she  
19 couldn’t give more credit than what is allowed in the WAC. Dkt. 18 at 3. Immelt asserts  
20 that DOL and Defendants rejected her application to sit for the exam because she had not  
21 met the 2000 hours in the last seven years requirement. *Id.* (citing Dkt. 18-3 at 17, Ex. F).  
22

1 Immelt continued to try to persuade McCowan and DOL that some of the  
2 residential appraisals she had worked on were not run-of-the-mill homes or appraisals.  
3 One was a rare, “Grade 20—Exceptional” property; an estate assembled and renovated  
4 by an unnamed individual at a cost of something more than \$150,000,000. *See*  
5 Declaration of Jay Immelt, Dkt. 18-2 at 3.<sup>3</sup> Immelt’s chief complaint is that DOL and  
6 Defendants refused to credit her more than the WAC standard 12 hours for the work she  
7 did on that appraisal. Appraiser Jay Immelt<sup>4</sup> asserts that 80 hours is a reasonable request  
8 for credit for that work. *Id.*

9 Immelt also alleges that DOL and Defendants failed to properly credit seven  
10 residential “Real Estate Owned” (“REO”) appraisals she did for lending institutions,  
11 valuing properties owned by the banks after foreclosure. She argues that each of those  
12 more complex appraisals should have been eligible for credit beyond the twelve hours  
13 permitted under the WAC. Dkt. 18 at 9.

14 Immelt’s efforts were not successful and on March 23, 2020, Defendants rejected  
15 her application because she had not logged 2000 hours of creditable appraisal experience  
16 in the prior seven years, as required by WAC 308-125-070(1). *Id.* at 3.

17 She sued, alleging that WAC 308-125-075, governing how much credit toward the  
18 2000 requirement an Appraisal Trainee can earn for work on various types of appraisals,

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19 <sup>3</sup> Immelt’s Motion to Seal, Dkt. 20, asks the Court to seal this Declaration in the privacy  
20 interest of the third party who owns the Grade 20 Property. That Motion is unopposed, and it is  
**GRANTED**. Dkt. 18-2 shall be filed under seal.

21 <sup>4</sup> Jay Immelt is a licensed appraiser and apparently Johanna Immelt’s relative. His  
22 testimony is offered as expert testimony on the time Immelt spent appraising the Grade 20  
property.

1 is unconstitutionally vague on its face and as applied to her case. She argues that Sharp  
 2 and McCowan violated her constitutionally protected right to a vocation of her choosing  
 3 when they adhered to WAC 308-125-075's maximum credit per appraisal and refused to  
 4 extend her additional credit for work on the Grade 20 Property and the seven REO  
 5 properties.

6 Immelt also challenges WAC 308-125-070's 2000-hour requirement itself,  
 7 arguing that it is more restrictive than its federal counterpart, which requires only 1000  
 8 hours of relevant experience with no time limitation. Dkt. 18 at 5–6 (citing Financial  
 9 Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA")).<sup>5</sup> Immelt  
 10 provides no citation for this federal requirement, or for her apparent claim that it  
 11 effectively preempts any more stringent state regulation requiring more hours or  
 12 imposing a time limit.

## 13 II. DISCUSSION

### 14 A. Summary Judgment Standard

15 Summary judgment is proper if the pleadings, the discovery and disclosure  
 16 materials on file, and any affidavits show that there is "no genuine dispute as to any  
 17 material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ.  
 18 P. 56(a). In determining whether an issue of fact exists, the Court must view all evidence  
 19 in the light most favorable to the nonmoving party and draw all reasonable inferences in  
 20 that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986);

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 22 <sup>5</sup> The portion of FIRREA that applies to appraisal is Chapter 34A, Pub. L. 101-73,  
 codified at 12 U.S.C. § 3331 *et seq.*

1 *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact  
2 exists where there is sufficient evidence for a reasonable factfinder to find for the  
3 nonmoving party. *Anderson*, 477 U.S. at 248. The inquiry is “whether the evidence  
4 presents a sufficient disagreement to require submission to a jury or whether it is so one-  
5 sided that one party must prevail as a matter of law.” *Id.* at 251–52. The moving party  
6 bears the initial burden of showing that there is no evidence which supports an element  
7 essential to the nonmovant’s claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).  
8 Once the movant has met this burden, the nonmoving party then must show that there is a  
9 genuine issue for trial. *Anderson*, 477 U.S. at 250. If the nonmoving party fails to  
10 establish the existence of a genuine issue of material fact, “the moving party is entitled to  
11 judgment as a matter of law.” *Celotex*, 477 U.S. at 323–24. There is no requirement that  
12 the moving party negate elements of the non-movant’s case. *Lujan v. National Wildlife*  
13 *Federation*, 497 U.S. 871 (1990). Once the moving party has met its burden, the non-  
14 movant must then produce concrete evidence, without merely relying on allegations in  
15 the pleadings, that there remain genuine factual issues. *Anderson*, 477 U.S. 242, 248  
16 (1986).

17 **B. WAC 308-125-075(4)’s “catch-all” provision is not unconstitutionally vague.**

18 Immelt first claims that WAC 308-125-075(4) is unconstitutionally vague on its  
19 face because its “catch-all” provision includes no standards for evaluating, on a case-by-  
20 case basis, appraisal experience which is not specifically covered elsewhere in the  
21 regulation.  
22

1 Defendants correctly point out that the “void for vagueness” doctrine arises almost  
2 exclusively in the context of criminal or other statutes prohibiting conduct. Dkt. 24 at 6  
3 (citing *Koelender v. Lawson*, 461 U.S. 352, 357–58 (1983)). An ordinance may  
4 be facially unconstitutional in one of two ways: “either it is unconstitutional in every  
5 conceivable application, or it seeks to prohibit such a broad range of protected conduct  
6 that it is unconstitutionally overbroad.” *Foti v. City of Menlo Park*, 146 F.3d 629, 635  
7 (9th Cir. 1998) (internal quotations omitted).

8 WAC 308-125-075(4) does not prohibit anything. It simply and clearly provides  
9 that DOL will evaluate on a case-by-case basis any relevant appraisal experience not  
10 addressed in the 36 specifically enumerated kinds of appraisal experience outlined in  
11 WAC 308-125-075(1)–(3).

12 To establish facial unconstitutionality, Immelt must demonstrate that WAC 308-  
13 125-075(4)’s “cases by case” evaluation of experience cannot be constitutionally applied  
14 in any case. She makes no effort to do so. Instead, she repeatedly argues that the Grade  
15 20—Exceptional property appraisal that she worked on was unusually, perhaps uniquely,  
16 complex and sophisticated. She asserts that Defendants were constitutionally required to  
17 give her additional credit for that work, under the very catch-all provision she attacks as  
18 void for vagueness.

19 That is not a facial challenge to the regulation; it is a claim that the regulation’s  
20 catch-all provision should have been applied differently. Immelt’s Motion for Summary  
21 Judgment on her claim that Washington’s appraiser licensing regulatory scheme is  
22 unconstitutionally vague on its face is **DENIED**.

1 **C. WAC 308-125-070’s 2000-hour requirement is not unconstitutional.**

2 Immelt also argues that Washington’s appraiser licensing regulatory scheme is  
 3 unconstitutional as applied to her licensing application. Dkt. 18 at 14. This argument is  
 4 based on her claim that WAC 308-125-070’s 2000-hour requirement (in the past seven  
 5 years) is unconstitutional as a matter of law because it is more stringent than its federal  
 6 counterpart, FIRREA. *Id.* She argues (but does not demonstrate) that FIRREA imposes a  
 7 1000-hour requirement, with no time limit.

8 But Immelt has not established that FIRREA, much less the United States  
 9 Constitution, requires the Washington DOL to accept 1000 hours of relevant experience  
 10 over an unlimited time to sit for the licensing examination. FIRREA expressly does *not*  
 11 prohibit states from imposing requirements that are more stringent than those outlined in  
 12 the federal act:

13 [T]he term “State licensed appraiser” means an individual who has satisfied  
 14 the requirements for State licensing in a State or territory whose criteria for  
 15 the licensing of a real estate appraiser currently *meet or exceed the*  
*minimum criteria issued by the Appraisal Qualifications Board* of The  
 Appraisal Foundation for the licensing of real estate appraisers.

16 12 U.S.C. § 3345(c) (emphasis added). It does not purport to preempt more stringent state  
 17 law requirements; it sets forth a minimum and expressly permits states to impose more  
 18 stringent requirements.

19 Immelt’s core complaint is that Washington’s appraiser qualification requirements  
 20 should have been relaxed when FIRREA’s requirements were relaxed. She claims that  
 21 the Washington statute authorizing the Washington Regulations, RCW 18.140.030(15),  
 22 permits the Director (of DOL) *only* to “do all other things necessary to . . . minimally



1 meet the requirements of federal guidelines regarding state certification or licensure or  
2 appraisers[.]” Dkt. 18 at 6. She argues that Defendants “vastly exceeded the rule making  
3 authority of the Director of the Appraisal program” and that they used the regulations to  
4 “deprive [her] of her right to take the licensing test.” *Id.* at 7.

5 It is not at all clear that this state statute can be read to authorize only regulations  
6 which minimally meet the federal requirements or that any regulation purporting to  
7 impose more stringent requirements exceeds the statutory rule-making authority. But it is  
8 clear that Immelt’s complaints about the regulations are based on state law; they are not a  
9 matter of constitutional, or even federal, law. Violation of a state statute is not the basis  
10 for a § 1983 claim, or for a claim under *Ex Parte Young*, 209 U.S. 123, 159–60 (1908),  
11 seeking to enjoin an official from violating the constitution or federal law.

12 Immelt has not established that, as a matter of law, either WAC 308-125-070(1) or  
13 WAC 308-125-075(4) was applied unconstitutionally to her licensing application, or that  
14 either Defendant violated her constitutional rights by determining that her experience log,  
15 and thus her application, was incomplete. Her Motion for Summary Judgment on her “as  
16 applied” constitutional challenge to the regulations is **DENIED**.

17 **D. Immelt is not entitled to summary judgment on her official capacity claims.**

18 Immelt’s primary claims relate to the WAC regulations themselves, but she sued  
19 Sharp and McCowan in their official capacities, seeking money damages and an  
20 injunction requiring them to allow her to sit for the appraiser examination. She now seeks  
21 summary judgment on her official capacity claims against Sharp and McCowan. *See* Dkt.  
22

1 26 at 2 n.3 (“the complaint clearly and unmistakably asserts that they were sued in their  
2 official capacity”).

3 Sharp and McCowan argue that Immelt’s official capacity claims seeking damages  
4 are effectively damages claims against the state and that such claims are barred by the  
5 Eleventh Amendment. Dkt. 24 at 5. They argue that such claims are in effect claims  
6 against the State itself, and the State is not a “person” for purposes of 42 U.S.C. § 1983.

7 Section 1983 provides a remedy for the violation of a person’s constitutionally  
8 protected rights by any *person* acting under color of state law. 42 U.S.C. § 1983; *see also*  
9 *Monell v. Dep’t of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 683 (1978). The employee  
10 actor—the *person*—who causes a constitutional violation is individually liable to the  
11 plaintiff under § 1983. But there is no respondeat superior liability under § 1983; a  
12 municipality is not liable simply because it employs a tortfeasor. *Monell*, 436 U.S. at 691.

13 State officials in official capacity suits for damages assume the identity of the  
14 government that employs them because an award would require payment of funds from  
15 the state treasury, thus they are not a “person” under § 1983. *See Hafer v. Melo*, 502 U.S.  
16 21, 27 (1991); *see also Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989) (“[A]  
17 suit against a state official in his or her official capacity is not a suit against the official  
18 but rather is a suit against the official’s office.”).

19 In enacting Section 1983, Congress did not override the State’s Eleventh  
20 Amendment immunity to actions for damages in federal court. *Will*, 491 U.S. at 69. A  
21 state can waive its Eleventh Amendment immunity. *McLaughlin v. Bd. of Trs.*, 215 F.3d  
22 1168, 1170 (10th Cir. 2000). However, a state’s general waiver of its sovereign immunity

1 is not considered a waiver of the Eleventh Amendment immunity. *Leer v. Murphy*, 844  
2 F.2d 628, 632 (9th Cir. 1988). The Eleventh Amendment precludes § 1983 actions for  
3 damages against a state in federal court. *Doe v. Lawrence Livermore Nat'l Lab'y*, 131  
4 F.3d 836, 839 (9th Cir. 1977).

5 Immelt's "official capacity" Section 1983 damages claims against Sharp and  
6 McCowan are barred by the Eleventh Amendment, and her motion for summary  
7 judgment on those claims is **DENIED**.

8 In her Reply, Immelt clarifies that her "official capacity" claims seek only  
9 prospective, injunctive relief; not money<sup>6</sup> damages, and are thus cognizable. *See* Dkt. 26  
10 at 2 n.3. Magistrate Judge Creatura's Report and Recommendation noted that,  
11 notwithstanding the Eleventh Amendment, one may assert claims against officials in their  
12 official capacity when she is seeking prospective injunctive relief. Dkt. 4 at 3 (citing  
13 *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 818 (9th Cir. 2001)).

14 Although a state official acting within the scope of their valid authority normally  
15 enjoys sovereign immunity, if the official is enforcing a law that conflicts with federal  
16 authority, they are "stripped of [their] official or representative character." *Ex Parte*  
17 *Young*, 209 U.S. at 159–60. A court may therefore issue a declaratory judgment and  
18 enjoin official conduct in conflict with the Constitution or congressional statutes. *Id.* at  
19 155–56; *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 848 (9th Cir. 2002)  
20 (explaining that *Ex Parte Young* extends to claims for declaratory relief).

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22 <sup>6</sup> Immelt's Complaint, Dkt. 6, seeks \$300,000 in damages, and it was filed after this  
Court adopted the Magistrate Judge's Report and Recommendation, Dkt. 5.

1 Immelt's claims against Sharp and/or McCowan are thus arguably cognizable  
2 under *Ex Parte Young*, and not subject to Eleventh Amendment Immunity, to the extent  
3 she seeks to enjoin the proper official's unconstitutional conduct. But, as is discussed  
4 above, Immelt has failed to establish that the officials she seeks to enjoin have acted  
5 unconstitutionally. Immelt's Motion for Summary Judgment on her official capacity  
6 injunction claim is **DENIED**.

7 **E. Sharp and McCowan are entitled to Qualified Immunity on any claims**  
8 **against them personally.**

9 It is not clear whether Immelt asserts damages claims against Sharp and McCowan  
10 in their personal capacities. If and to the extent she does, Defendants argue they are  
11 entitled to qualified immunity.

12 Under the qualified immunity doctrine, "government officials performing  
13 discretionary functions generally are shielded from liability for civil damages insofar as  
14 their conduct does not violate clearly established statutory or constitutional rights of  
15 which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818  
16 (1982). The purpose of the doctrine is to "protect officers from the sometimes 'hazy  
17 border' between excessive and acceptable force." *Brosseau v. Haugen*, 543 U.S. 194, 198  
18 (2004) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). A two-part test resolves  
19 claims of qualified immunity by determining whether plaintiffs have alleged facts that  
20 "make out a violation of a constitutional right," and if so, whether the "right at issue was  
21 'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*,  
22 555 U.S. 223, 232 (2009).

1 Qualified immunity protects officials “who act in ways they reasonably believe to  
2 be lawful.” *Garcia v. County of Merced*, 639 F.3d 1206, 1208 (9th Cir. 2011). “The  
3 reasonableness inquiry is objective, evaluating ‘whether the officers’ actions are  
4 “objectively reasonable” in light of the facts and circumstances confronting them, without  
5 regard to their underlying intent or motivation.’” *Huff v. City of Burbank*, 632 F.3d 539,  
6 549 (9th Cir. 2011) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)). Even if the  
7 officer’s decision is constitutionally deficient, qualified immunity shields her from suit if  
8 her misapprehension about the law applicable to the circumstances was objectively  
9 reasonable. *See Brosseau*, 543 U.S. at 198. Qualified immunity “gives ample room for  
10 mistaken judgments” and protects “all but the plainly incompetent.” *Hunter v. Bryant*,  
11 502 U.S. 224 (1991).

12 Defendants did not accept Immelt’s application because she did not have 2000  
13 hours of relevant experience in the preceding seven years. Immelt has not established that  
14 the WAC regime supporting that decision was unconstitutional, and she has not  
15 addressed or demonstrated that defendants’ the decision violated “clearly established”  
16 constitutional law.

17 There is no case holding or suggesting that the imposition of a more stringent  
18 experience requirement is unconstitutional. Sharp and McCowan are entitled to qualified  
19 immunity on any damages claim Immelt asserts against them personally. If and to the  
20 extent Immelt seeks summary judgment on this claim, it is **DENIED**.

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1 Plaintiff Immelt's Motion for Summary Judgment, Dkt. 18, is **DENIED**. Her  
2 motion to seal, Dkt. 20, is **GRANTED**. Defendants' Motion for Summary Judgment,  
3 Dkt. 32, will be addressed in a separate Order.

4 **IT IS SO ORDERED.**

5 Dated this 7th day of January, 2022.

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8 BENJAMIN H. SETTLE  
9 United States District Judge  
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